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IN THE

Supreme Court of the United States

..... TERM 1944

No. 1078 127

BANKERS TRUST COMPANY, as Trustee, *et al.*,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITION OF BANKERS TRUST COMPANY, AS TRUSTEE, *ET AL.* FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF

Dated June 2, 1944.

JESSE E. WAID,
WILLIAM ST. JOHN TOZER,
ELBERT N. OAKES,
WALTER H. BROWN,
WILBERFORCE SULLY, JR.,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

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BANKERS TRUST COMPANY, as Trustee, *et al.*, *Petitioners,* *against* THE PEOPLE OF THE STATE OF NEW YORK, *Respondents.*	No.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The following Petitioners respectfully pray for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Second Circuit entered on March 3, 1944, wherein so far as this Petition is concerned, that Court sustained an order dated June 2, 1943 made by the United States District Court for the Southern District of New York (in proceedings to reorganize the Debtor hereinafter mentioned under Section 77 of the Bankruptcy Act, as amended) (R. 5)* pursuant to its opinion filed February 19, 1943 (R. 73), which accorded to The People of the State of New York (herein called the "State") a lien in respect of its grade crossing elimination claims, but reserved for future determination the question whether the State's lien enjoyed priority over the preexisting mort-

*(R.) with a numeral indicates a page reference to the transcript of record in the Circuit Court of Appeals.

gages of New York, Ontario & Western Railway Company, Debtor (herein called the "Debtor"):

Bankers Trust Company, as Trustee under the Debtor's Refunding Mortgage dated June 1, 1892,
The New York Trust Company, as Trustee under the Debtor's General Mortgage dated May 31, 1905,
Frederick E. Lyford, Trustee of the Debtor in proceedings under §77 of the Bankruptcy Act.
Westmoreland Coal Company, a creditor under the "six-months' rule."

Summary Statement of Matters Involved

This petition involves the question whether as to grade crossing elimination claims arising under the New York statute which were not in default when the Debtor's petition for reorganization under Section 77 of the Bankruptcy Act was filed, the State could acquire a lien upon the mortgaged properties of the Debtor.

Facts

1. The Debtor's Refunding Mortgage is dated as of June 1, 1892 and secures an issue of $20,000,000 principal amount of Bonds presently outstanding (R. 60).

2. The Debtor's General Mortgage is dated as of May 31, 1905 and secures an issue of $12,000,000 principal amount of Bonds presently outstanding or pledged (R. 60).

3. At a general election held on November 3, 1925, Section 14 of Article VII of the State Constitution was approved, authorizing the Legislature to make provision for State aid in financing the elimination of grade crossings; and, at a general election held on November 8, 1927, an amendment thereto was approved (R. 88).

4. The Report of the Joint Legislative Committee of the New York Legislature, which had been appointed to investigate the grade crossing elimination problem, stated in part as follows:

> "The committee has been very much concerned with the question as to how the State would be assured of the repayment of moneys advanced in aid of the railroad companies under the provisions of the constitutional amendment.
>
> On January 19, 1925, the Chairman of the committee asked the Attorney General for an opinion on the following question: 'Has the Legislature the power to insure the repayment to the state of money advanced in aid of a railroad company under the provisions of the grade crossing constitutional amendment by making the state's claim a first lien upon the property of the railroad and collecting it in the form of a tax?'
>
> The Attorney General, in response to this question, furnished an opinion to the committee that the repayment of the moneys so advanced to the railroad companies could be made a first and paramount lien upon the property of the railroads.
>
> Such a provision was put in the first draft of the different grade crossing acts. The railroad companies then satisfied the committee that under the provisions of many of their mortgages this clause in the bills would make it impossible for them to avail themselves of state money without making these mortgages due within thirty days if the railroad companies permitted a lien to be put on their property ahead of these mortgages." (N. Y. Leg. Doc. 1926, Vol. 17, No. 94, at pp. 8 and 9).

5. Thereupon, the language of the bill was modified, and as so modified, the bill was enacted into law as Chapter 233 of the New York Laws of 1926, providing that 50 per centum of the cost of each elimination should be borne

by the railroad affected, and that upon application the State would advance the necessary funds to the railroad upon condition that repayment of such advances be made in instalments at such times and in such amounts as should be fixed by the Comptroller and set forth in a written statement to be served by him upon the railroad. Section 4 of Chapter 233 of the New York Laws of 1926 provided in part as follows:

> "*In the event of the failure or refusal* of the railroad corporation or of its successors or assigns *to pay* the amounts specified in such statement at the times therein prescribed, the amount or amounts so due and payable *shall be and become a first and paramount lien* upon all real property of said railroad within the municipal corporation within which the work is done." (Emphasis added.)

6. Chapter 678 of the New York Laws of 1928 repealed Chapter 233 of the New York Laws of 1926, as amended, and the requirements of certification, apportionment, assessment and levy were imposed in addition to default as conditions precedent to the existence of a lien to secure grade crossing elimination claims. The pertinent portions of Chapter 678, as amended, are contained in subdivision 3 of Section 4, which reads in part as follows:

> "The railroad corporation or corporations and the county or counties shall pay into the state treasury the amount or amounts specified in such statement at the times therein prescribed. * * * In the event of the failure or refusal of the railroad corporation or corporations, or the successor or successors thereof, to pay the amount or amounts specified in such statement at the times therein prescribed, * * * the amount or amounts so due and payable may be recovered as follows:

The comptroller may certify the amount or amounts so due and payable to the board of supervisors of the county or counties in which the crossing is located, whereupon, it shall be the duty of such board of supervisors to apportion the amount or amounts so certified to the several towns and cities in such county according to the assessed valuation of the real property of such railroad corporation or corporations or the successor or successors thereof in such respective towns and cities and to place the several amounts so apportioned on the respective assessment rolls of such towns and cities and to issue its warrant or warrants for the collection thereof. Thereupon it shall become the duty of such towns and cities through their proper officers to collect the respective several amounts so apportioned in the same manner as other taxes are collected in such towns and cities and when collected to pay the same to the county treasurer of such county who shall thereupon pay the same into the state treasury. *Any amount so levied shall thereupon become and be a first and paramount lien* upon all real property of such railroad corporation or corporations or the successor or successors thereof within such respective towns and cities." (Emphasis added.)

7. Pursuant to Chapter 678 of the Laws of 1928, as amended, the Public Service Commission of the State ordered the elimination of certain grade crossings. The Debtor elected to pay its share of the cost in installments of principal and interest over a period of fifty years. The Comptroller of the State determined the Debtor's share of the cost of the completed projects and fixed the amounts, terms and due dates of the fifty installment payments to be made by the Debtor (R. 58).

8. On May 20, 1937, the petition of the Debtor for reorganization under Section 77 of the Bankruptcy Act, as

amended, was approved as properly filed (R. 64). Previously, the Railway Company had not committed any default in making the installment payments as they became due (R. 65). The first default occurred in 1938 and all subsequently maturing instalments have been defaulted (R. 59).

9. On or about August 15, 1941, proof of claim was filed by the State for installments then in default (R. 16). On or about March 11, 1942, proof of claim was filed by the State for subsequently maturing installments which the State had purported to accelerate (R. 33). The Circuit Court of Appeals denied the existence of a right of acceleration.

10. Objections to said claims were filed by Petitioners; and, after a hearing, the District Court for the Southern District of New York held that said claims constituted liens against the Debtor's property, but reserved for future determination the question of priority of the State's lien.

11. Upon appeal, the Circuit Court of Appeals for the Second Circuit modified the decision of the District Court 1) by allowing a lien for the overdue installments, and 2) by denying to the State a right of acceleration. In its decision, the Circuit Court of Appeals made certain references to the claims having the status of taxes.

12. Petitioners applied to the Circuit Court of Appeals for a rehearing on the ground that the decision of that Court that the claims were payable as taxes, thereby indicating priority thereof over the Mortgages, was erroneous because contrary to the law of the State of New York, as enunciated in the case of *Central Savings Bank* v. *City of New York*, 279 N. Y. 266 (December 6, 1938). The Circuit Court of Appeals on May 9, 1944 denied the

motion. The Court stated that "The appeal did not adjudicate the issue reserved by the District Court, namely, 'determination as to priority of the State's lien.'" (Not yet reported).

Jurisdiction of the Court

This application is made under Section 240 of the Judicial Code, as amended (43 Stat. 938).

Specification of Error

The Circuit Court of Appeals has erred in holding that the claims of the State are liens.

Reasons for Application for the Writ

1. The question presented is one of general public interest.

2. The question of the extent to which statuory liens may be perfected subsequent to the filing of a debtor's petition under Section 77 of the Bankruptcy Act is a matter of importance in railroad reorganization proceedings generally. The decision of the Circuit Court of Appeals in this case raises a serious question of law with respect to the proper construction of Section 77 of the Bankruptcy Act and the applicability of Section 67(b) of the Act to railroad reorganization proceedings. The present state of the law on the broad question of the extent to which general bankruptcy provisions are to be deemed applicabe to railroad reorganization proceedings under Section 77 is not clear. As there has been no definitive adjudication by this Court, of the more precise issue here presented, or by any subordinate tribunal prior to the decision in this case, the granting of the petition for writ of certiorari will permit a clarification of the law. This point has particular importance in this case because prior to bankruptcy, under

subdivision 3 of Section 4 of Chapter 678 of the State Laws of 1928 as amended, a lien did not arise until after default, certification, apportionment, assessment and levy, none of which occurred until after the date of the filing of the Petition for Reorganization herein (R. 65).

WHEREFORE, Petitioners respectfully pray that a writ of certiorari issued to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered on its docket 111, and that said decree of the United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that Petitioners may have such other and further relief in the premises as to this Honorable Court may seem just.

Dated June 2, 1944.

BANKERS TRUST COMPANY, as Trustee,
By JESSE E. WAID,
WILLIAM ST. JOHN TOZER,
Counsel.

THE NEW YORK TRUST COMPANY, as Trustee,
By WALTER H. BROWN,
Counsel.

FREDERIC E. LYFORD, Trustee,
By ELBERT N. OAKES,
Counsel.

WESTMORELAND COAL COMPANY,
By WILBERFORCE SULLY, JR.,
Counsel.